BRIEF IN SUPPORT OF PETITION

A.

Opinions of Courts Below.

The opinion of the Circuit Court of Appeals for the Eighth Circuit is not yet reported but is appended hereto as Appendix 1. The District Court rendered an opinion on motion to dismiss which is found in the record at P. 23. Its findings of fact and conclusions of law on trial appear in the record at Pages 52 to 64.

B.

Statement of the Case.

A sufficient statement of the case has been made in the petition and in the interests of brevity will not be repeated at this point.

C.

Assignment of Errors.

Petitioner assigns as errors the ruling of the Circuit Court of Appeals for the Eighth Circuit upon the questions set forth in the petition.

D.

ARGUMENT.

Point I.

CERTIFICATION OF DELINQUENT INSTALMENTS OF THE SPECIAL ASSESSMENTS DIRECTLY TO THE COUNTY TREASURER WAS A MERE IRREGULARITY, NOT AFFECTING IN ANY WAY THE OBLIGATION OF THE TAXPAYER TO PAY, THE DUTY OR OBLIGATION OF THE COUNTY TREASURER TO SELL OR THE LIEN OF THE SPECIAL ASSESSMENT AND WAS IN NO WAY PREJUDICIAL TO THE BONDHOLDER.

Point II.

THE PROPERTY OWNER HAS NOT ESCAPED FULL LIABILITY FOR PRINCIPAL AND INTEREST BECAUSE OF THE 1935 SALE, HENCE BONDHOLDERS HAVE NOT SUFFERED ANY DAMAGE.

Point III.

ON NO THEORY HAVE MORE THAN NOMINAL DAMAGES BEEN ESTABLISHED ACCORDING TO THE STATE RULE AND THE RULE OF THE TENTH CIRCUIT.

I.

CERTIFICATION OF DELINQUENT INSTALMENTS OF THE SPECIAL ASSESSMENTS DIRECTLY TO THE COUNTY TREASURER WAS A MERE IRREGULARITY, NOT AFFECTING IN ANY WAY THE OBLIGATION OF THE TAXPAYER TO PAY, THE DUTY OR OBLIGATION OF THE COUNTY TREASURER TO SELL, OR THE LIEN OF THE SPECIAL ASSESSMENT AND WAS IN NO WAY PREJUDICIAL TO THE BONDHOLDER.

The city was not liable for any default of the county officers charged with the duty of making sale. The City of Winner v. Kelley (CCA8) 65 F (2) 955; Grand Lodge v. City of Winner, 63 SD 390, 259 NW 278. Default of the county treasurer in making sales in any particular year may therefore be disregarded and the question is whether the city auditor substantially complied with the law requiring him to certify instalments that were delinquent each year. That he did certify them each year admits of no doubt. He made out a proper certificate. It contained all of the information the statute required. (61, 38, 40, 42, 43, 44).

From 1932 to 1936, inclusive, instead of taking his certified list of delinquent instalments to the county auditor for him to turn over to the county treasurer with his certificate attached, he gave them directly to the county

treasurer. The county treasurer took the certified delinquencies as properly certified to him and in one year made a sale of the property so certified. (62, 42). He, the responsible officer, charged with this important duty, made an administrative construction that the act of certification was regular and proper and this administrative construction is not to be disregarded. Administrative construction is recognized by the courts as aiding in the interpretation of statutes. Badger v. Hoidale (CCA8) 88F (2) 208; US v. Madigan, 300 US 500.

The question is one fundamentally of interpretation of a statutory scheme and reaches far into the spirit written into the statutory plan.

The statutes of the state will now be turned to in an effort to gain from them the legislative attitude toward the statutory act of certification.

The pertinent statute clearly requires the body of the South Dakota statutes to be examined for after indicating the duty of the county auditor and the county treasurer with reference to certifying and collecting delinquent special assessments, it provides as follows:

> " * * * Sales of property made for the collection of delinquent special assessments shall be conducted in the same manner as other tax sales made by the county treasurer and the owners of the property so sold shall have the same length of time in which to redeem the same, and be entitled to the same notice before the issuance of a tax deed as in other cases of tax sales." (Sec. 6797 S. D. R. C. 1919).

The statutes of South Dakota indicate beyond the possibility of any doubt that the act of the county auditor in certifying to the county treasurer delinquent special assessments or his failing to certify them and the act of the county treasurer in accepting as conclusive upon him a certification from the city treasurer is a mere irregularity and is a defect not in any way invalidating sales made by the county

treasurer, if he makes sales, or lessening his duty to sell if he accepts the certification of the city auditor without protest or objection.

Section 6402 of the S. D. Revised Code of 1919, as amended by Chapter 187 of the S. D. Session Laws of 1929, makes it the duty of the city auditor between the 15th day of September and the 1st day of October in each year to certify to the county auditor of the county in which a municipality is located all special assessments remaining unpaid which became delinquent on or before the 15th day of September of that year.

The statute then provides:

> "In certifying such special assessments, the city auditor or town clerk shall specify the consecutive number of the assessment, as shown by the tax book in his office, the original amount of the assessment, or instalment thereof, so certified, the amount of the interest and penalty thereon to the fifteenth day of September of that year, the name of the person in whom the title to the property rests, as shown by said tax book, the character of the improvement for which the assessment was made, and a brief description of the property against which the assessment was made, and it shall be the duty of the county auditor and county treasurer to proceed, with reference to such assessment, as provided in Section 6797."

Section 6797 of the S. D. Revised Code of 1919 provides as follows:

> " * * * it shall be the duty of such auditor to immediately certify the same to the county treasurer, and such delinquent special assessments shall be collected by the county treasurer, by sale of the lots or parcels of land so assessed at the next succeeding sale of real property for delinquent taxes, in the same manner and at the same time and place. All real property sold for such delinquent special assessments and not

redeemed shall be entered by the county treasurer upon the duplicate tax lists of the county for the succeeding years, and noted upon all duplicate tax receipts for such real property; and it shall be the duty of the county treasurer to add to the amount of each special assessment so certified interest at the rate of one per cent per month, and ten cents on each lot or parcel of ground for costs of advertising and no other costs or penalties shall be added except as provided by law for certificate of sale, deed and acknowledgment. Sales of property made for the collection of delinquent special assessments shall be conducted in the same manner as other tax sales made by the county treasurer and the owners of the property so sold shall have the same length of time in which to redeem the same, and be entitled to the same notice before the issuance of a tax deed as in other cases of tax sales."

Chapter 187 of the S. D. Session Laws of 1929 above quoted from makes the city auditor the source of all the information given to the county officials. Until an assessment or an instalment is delinquent, the county officers have nothing to do with collection and may even be entirely ignorant of the existence of any certain special assessment lien against any property in the city. When the city auditor certifies, he specifies the consecutive number of the assessment as shown by the taxbook in his office; the original amount of the assessment, or instalment thereof; the original amount of interest and penalty thereon until September 15 of that year, the name of the person in whom the title to the property rests, the character of the improvement for which the assessment was made, and a brief description of the property against which the assessment was levied. It is upon this information which is certified to him that the county auditor would act; in fact, the county auditor would do no more than pass on to the county treasurer what had been certified to him. The county auditor has no power of amendment or correction of the return of the certificate or report of the city auditor. He merely transmits. He is a

conduit. He even makes no record in his office or is not required to make any record in his office. In sharp distinction from this situation, it is the duty of the county auditor with reference to general taxes, to fix the rate percent and to extend the taxes. Special assessments are specifically exempted from this provision. Section 6752 S. D. Revised Code of 1919. This statute provides as follows:

> "**Extension, Apportionment.** All county, township city, town and school taxes, **except special assessments in cities and towns,** shall be levied or voted in specific amounts, and the rate per cent shall be determined from the total valuation of the property as equalized by the tax commission each year. The rate per cent of all such taxes shall be calculated and fixed by the county auditor, in mills and tenths or hundredths of mills, within the limitations prescribed by this code, and all county, township, city, town and school taxes, **except special assessments in cities and towns,** shall be extended by the county auditor; provided, that if any county, township, city, town or school district shall return a greater amount than the prescribed rate will raise, the county auditor shall extend only such amount of tax as the prescribed rate will produce: Provided, that after the county auditor has calculated and fixed, in mills and tenths or hundredths of mills, the rate per cent of all taxes for county, township, city, town or school districts, as in this article provided, he may extend the same upon the tax lists, including the state tax levies, as one amount under the heading "Total Consolidated Tax," which, when collected, shall be apportioned by the county auditor and treasurer at the end of each month to the state, county, township, city, town or school district for which it was levied and be paid to such state, county, township, city, town or school district, as a total amount. Such amount when received by the state, county, township, city, town or school district shall be by the treasurer thereof apportioned to the various

funds that were authorized to be levied for the current year." (Emphasis supplied).

After general taxes are levied, the county auditor makes out a tax list for each assessment district containing the following information:

"1. A list in alphabetical order of all natural persons and corporations in whose name any property other than real property has been listed, with the valuation thereof.

2. A list of the taxable lands in the district, not including the city and town lots, with the valuation thereof.

3. A list of the city or town lots in each city or town in or composing such district, with the valuation thereof.

The county auditor shall foot each and every column of taxes, and prove the same so that they shall aggregate the same as the footing of the column of total taxes, and shall recapitulate the same. Such recapitulation shall show the total amount of taxes for each specific purpose for which a levy has been made, and the aggregate of such taxes upon the lands, city and town lots and personal property, separately." **Sec. 6754, S. D. Revised Code of 1919.**

Section 6755 of the S. D. Revised Code of 1919 provides that when the tax list is completed, a duplicate is given to the county treasurer by the county auditor on or before the first day of January of each year. The statute is as follows:

"**Duplicates, How Made—One to Treasurer.** The tax list when completed shall be kept by the county auditor as the property of the county. The county auditor shall also prepare a duplicate of the tax lists of his county, and shall also insert in such duplicate tax lists, in a separate column, that portion of the tax to be collected for state purposes, including the levies

for rural credits and state highways, such figures to be for the use of the treasurer in showing the amount of such state taxes upon tax receipts. He shall also deliver the same to the county treasurer on or before the first day of January following the date of the levy for the current year, and the county treasurer shall immediately upon receipt of such duplicate tax lists, specify, in a column for that purpose, the years for which any of the real property described therein has been sold for taxes and not redeemed."

Section 6757 of the S. D. Revised Code of 1919 provides that the county auditor shall, immediately after delivering such duplicate tax lists to the county treasurer,* charge him with the amount of the lists so delivered to him as shown in the recapitulation thereof in a book prepared for that purpose and all additional assessments made after the lists are delivered and shall credit him with amounts collected and deducted. The language of Sec. 6765 S. D. Rev. Code 1919 is as follows:

"**Duplicate Receipts, Contents.** Whenever any taxes are paid to the county treasurer, he shall make out duplicate receipts for the same, one of which shall be delivered to the person paying such taxes and the other shall within one week be filed by the treasurer with the auditor, and such duplicate receipt shall specify the land or other property on which such tax was assessed according to its description on the tax duplicate or in some sufficient manner, and shall also specify in a separate line or column on the face thereof the amount of taxes collected for state purposes, including the levies for rural credits and state highways, and shall also specify in separate lines or columns the amount of each separate and distinct fund as extended upon the tax duplicate. Such duplicate receipts shall also specify the years for which any of the real

* The county treasurer is the collector of taxes. Section 5925 Revised Code 1919; Sec. 6762 Rev. Code 1919.

property described therein has been sold for taxes and not redeemed, unless the certificates for such tax sales are more than six years old. All tax receipts issued by the county treasurer shall be bound in books of convenient size and numbered consecutively, commencing with number one on the first receipt issued for the taxes for any one year, and he shall not receipt for more than one year's taxes on the same property in one tax receipt, nor shall more than one series of numbers be used for any one year's taxes, but a separate and distinct series of numbers of receipts shall be kept and issued for the taxes of each year for which the same have been levied and assessed. Any county auditor who fails to enter, as in this section provided, the amount of taxes for state purposes, or any county treasurer who fails to specify the same upon the face of a duplicate tax receipt, shall be guilty of a misdemeanor."

The auditor's duties on receipt of the duplicate tax receipt are enumerated in Sections 6767 and 6768 S. D. Revised Code of 1919 in the following language:

"**Auditor Audits Receipt.** It shall be the duty of the auditor, on receiving any duplicate tax receipt from the treasurer, forthwith to examine the same and compare it with the tax list in his possession and see if the total amount of taxes and the several amount of the different funds are correctly entered and set forth in such receipt, and in case it shall appear that the treasurer has not collected the full amount of taxes and interest which according to the tax list and the terms of the receipt he should have collected, the auditor shall forthwith charge the treasurer with the amount such receipt falls short of the true amount, and the treasurer shall be liable on his official bond to account for and pay over the same." (Sec. 6767).

"**Payment Noted on Tax Lists.** Whenever any

taxes are paid the treasurer shall write on the tax duplicate, opposite the description of the real estate or the property whereon the same were levied, the word "paid," together with the date of such payment and the name of the person paying the same, and the county auditor, on receiving the duplicate receipt, shall forthwith makes the same entries on the tax list in his possession." (Sec. 6768).

As to property omitted from the assessment books when they are returned to him by the assessors of the various taxing districts, the duty of the county auditor is as specified in Section 1 of Chapter 110, S. D. Session Laws of 1919:

> "Section 1. Whenever the County Auditor shall discover or receive credible information, or if he shall have reason to believe that any real or personal property has from any cause been omitted, in whole or in part, in the assessment of any year or number of years, he shall proceed to correct the assessment rolls and add such property thereto, with the valuation."

The distinction in duties and responsibilities is clear. As to general taxes, the county auditor is a responsible official charged with a vast amount of detail, charged with keeping records, and charged with the duty of keeping a full and complete account with the county treasurer. No such duty is found to exist as to special assessments levied by a city. The county auditor is through when the certified record of the city auditor has passed through his hands to the county treasurer. In further distinction, the county treasurer, according to the provisions of Section 6797 S. D. Revised Code 1919, collects the assessments by sale of lots or parcels of land and he enters upon the duplicate tax lists of the county, all sales of real property for delinquent special assessments from which there is no redemption and makes note of that upon all duplicate tax receipts. He adds to the amount of each special assessment to certified interest and 10c on each lot or parcel of ground for costs of ad-

vertising. Sales of property according to this section are to be conducted in the same manner as are the tax sales made by the county treasurer.

Since the intent of the legislature, as found in a statutory scheme is being sought, the certificate of the county auditor attached or affixed to delinquent assessments or instalments certified to him by the city auditor must be likened to the warrant to the treasurer to collect general taxes.

The law of South Dakota provides that when the county auditor has prepared tax lists, after the tax levy is made, he shall deliver a duplicate of the lists to the county treasurer. Sections 6754 and 6755 S. D. Revised Code of 1919.

It further provides in Section 6756 of the S. D. Revised Code of 1919 as follows:

> "**Warrant to Treasurer to Collect Taxes.** The county auditor shall attach to each tax list his warrant, under his hand and official seal, in general terms, requiring the county treasurer to collect the taxes therein levied according to law; but no informality as to the requirements of this section shall render any proceeding for the collection of taxes illegal."

No informality in the warrant from the county auditor to the county treasurer will vitiate the proceedings taken or defeat the collection of general taxes. No amount of reasoning can convince that there should be any distinction in this respect between the certification of general taxes to the county treasurer by the county auditor and certification to the county treasurer of delinquent special assessments which have been certified by the city auditor. The South Dakota statutory plan may be summarized by saying that the intent is that all informalities and irregularities not going to matters of substance such as the very right to collect the tax or a special assessment must be disregarded. The liability on the part of the assessment payer or taxpayer remains the same as if the statute had been

carried out to the fullest extent of all of its literal requirements.

The formal and insubstantial nature of the act of the county auditor in certifying is emphasized when it is considered that he would act in a purely ministerial manner in attaching his certificate to the city auditor's certified return. He could not pass upon the validity of anything therein contained. In Smyth v. State (Ind.) 62 NE 449, the question of the nature of the acts of an officer pertaining to special assessments was considered and the discussion is pertinent as is shown by the following quotation:

> "Was it sufficient as a return for the auditor? The duties of a county auditor are purely ministerial. He has no judicial function; no right to decide what he shall do or leave undone. The law specifically directs the things he shall do, and grants him no power to change, modify, or omit any of the acts commanded of him. It is his duty to record the proceedings of the board of commissioners, and in free gravel road cases to enter upon the record the report of the committee appointed to apportion the cost of the improvement, showing how the estimated expense has been apportioned upon the lands ordered to be assessed as the same has been confirmed by the commissioners; and he shall place the assessments so made by him upon a special duplicate, to be provided by him at the expense of the county. Section 6860, Burns Rev. St. 1901. Under this statute, when the commissioners have considered the report, and decided that the apportionment of the expense has been fairly and equitably made, and have confirmed the same, it eo instanti becomes the plain and unequivocal duty of the auditor to spread said report upon the record, and to place said assessments, not stayed by judicial process, upon a duplicate for collection."

Irregularities do not deprive such proceedings of their validity. Informalities are to be disregarded.

In Parker v. Challiss 9 Kan. 155, Mr. Justice Brewer, later of the Supreme Court of the United States, said:

> "The other objections raised by counsel for defendant in error relate to irregularities in the proceedings to collect the tax. These irregularities, if any existed, (and we express no opinion either way upon these points,) cannot be inquired into in this injunction proceeding. * For, the power to do the work being given by law, and the work being done, equity will not interfere to relieve the lot owner from the payment of the cost simply on account of irregularities in the proceedings to collect."

Another example of an irregularity where the statute was not literally complied with is found in the case of Oklahoma City v. Vahlberg (Okla) 89 P. (2) 962, in which the Court held that:

> "where published notice of tax resale designated ad valorem taxes by '11-35' and directly thereunder was listed paving assessments sold at original sale with no date following, the abbreviation '11-35' would be deemed to refer to November 1935, and to the sale for both ad valorem taxes and paving assessments, and there would be deemed to have been substantial compliance with statute requiring notice of sale to contain statement of date on which realty was sold to county for delinquent taxes."

When there is an omission in proceedings to collect, when statutes have not been fully complied with, the question to be asked is whether any substantial injury has been suffered by the property owners. That, at least, is the modern doctrine.

Even, as respects the original assessment proceedings, the very foundation of the special assessment levy, the present tendency is to inquire whether the property owner has suffered any loss. In State, ex rel v. Mayor (Wis.) 77 NW 167, the court said:

"It would not be going very far to say that the acts of the council and board in this regard were substantially a compliance with the charter requirements, and gave jurisdiction of the proceedings; but, whether this be so or not, it certainly does not appear, either by the averments of the petition or by the facts set forth in the return, that the relator has suffered any injury by reason of the defects in the proceedings, or that he has paid one cent more than his property ought to be charged for the construction of the sewer. The tendency of legislation and of decision is more and more to require property owners who are contesting taxation, either general or special, to pay, as a primary condition of any relief, such part of the tax as is equitable and just, notwithstanding there may serious irregularities in the original levy."

Mere irregularities, it is often said, do not invalidate proceedings pertaining to special assessments. City of Superior v. Simpson (Neb) 209 NW 505; Munsell v. City of Hebron (Neb) 220 NW 289; Biggerstoff v. City of Broken Bow (Neb) 198 NW 156; Hackney v. Elliott (N. D.) 137 N. W. 433.

The question of irregularity or fundamental defect may be approached from another angle but with like result. The property owner has not escaped liability for principal or interest. The statutes of South Dakota make the lien assessed for the improvement an everlasting lien. The statutory provision is embodied in Section 6403 Revised Code of 1919 as follows:

"All special assessments lawfully levied upon real property in any municipal corporation are a perpetual lien thereon as against all persons or bodies corporate, except the United States and this state, from the date of the filing of the certified copy of the assessment roll in the office of the city or town treasurer, as provided in Section 6400."

A perpetual lien is one which remains in force until

it is paid or extinguished n some legal manner. State v. Day County, 64 SD 370, 266 NW 726. The lien of the assessment is prior to any pre-existing lien as by mortgage, Kirby v. Waterman, 17 SD 314, 96 N. W. 129, and, of course, subsequent liens are inferior to it.

So the property owner has gained nothing by any irregularity in the procedure. The lien and interest thereon remains as a charge against his property.

Further, when a certified statement is required from an officer for the purpose of information, such certified statement is not a jurisdictional prerequisite and a failure to follow the statute is at the most a mere irregularity. In Re City Comptroller (Minn) 76 NW 259. In this case, the Supreme Court of Minnesota said:

> "A provision of the law so indefinite as is the one in question, merely requiring that a 'certified statement' shall be 'made up' by the comptroller as to what assessments remain unpaid and delinquent, and which statement need not be filed with or presented to the court until the very moment application is made for judgment, cannot be held to be of a jurisdictional character in any strict sense. * * * While the statements presented by the comptroller when applying for the judgments in question may not have been properly certified to, and may have been defective in some respects, all that would have appeared if the statute had been literally complied with was before the court in other papers filed by the comptroller at the same time, and the court was fully informed in the premises. All of the statutory requirements on which depended the right to enter judgment had been observed, and, at most, there was a mere irregularity in the mode of procedure when the comptroller failed to certify as to some matters which, at the same time and in other documents filed by him, were made to appear."

The act of certification by the city auditor or by the

county auditor is informative only, and is not in any way decisive or determinative of the obligation of the property owner. The statute is purely directory, and failure to comply with its requirements merely an irregularity because its words do not include a negative importing that the act shall not be done in any other way. All of such facts have been held by the Supreme Court of South Dakota to indicate that literal compliance with the statute is not required, and failure to follow it as written is a mere irregularity. In Mallery v. Griffin, 43 S. D. 71, 177 N. W. 818, it quoted from French v. Edwards, 13 Wall. 506, to the effect that statutory requisitions intended for the guide of officers in the conduct of business devolved upon them, did not limit their power or render its exercise in disregard of the requisitions ineffectual, which included " 'regulations designed to secure order, system, and dispatch in proceedings, and by a disregard of which the rights of parties interested cannot be injuriously affected'." Further quoting from this case, the court said: " 'Provisions of this character are not usually regarded as mandatory unless accompanied by negative words importing that the acts required shall not be done in any other manner or time than that designated. But when the requisitions prescribed are intended for the protection of the citizens, and to prevent a sacrifice of his property, and by a disregard of which his rights might be and generally would be injuriously affected, they are not directory but mandatory.' " In the same case, quoting from the Supreme Court of Alabama in State Auditor v. Jackson County, 65 Ala. 142, the court said:

" 'We concur in opinion with the Supreme Court of the United States, that those legislative directions which have for their object the protection of the taxpayer against spoliation or excessive assessment, must be treated as mandatory. But, if there be enough to show that the assessment is so made and evidenced as to be understood, then regulations designed for the information of the assessor, or other officer, intended to promote dispatch, method, system and uniformity in modes of proceeding, are merely directory.' "

The words of the statute are "It shall be the duty of the city auditor * * * * to certify * * * * * " (Ch. 187, Laws of 1929). The statute is designed to secure a system and dispatch in the proceeding. There are no words to negative any other effective method of conveying information to the county treasurer. There is no question of protection of the assessment payer against spoliation or excessive assessment in the question of certification. Thus, all the tests laid down by the Supreme Court of South Dakota for determining, in a tax case, whether an official act required is mandatory or not, or whether a compliance that does in substance what a literal compliance would do is sufficient, are met in this case.

The failure of the county auditor to certify to the certified statement furnished by the city treasurer is no more than an irregularity because information which the county auditor was powerless to change in any manner was fully conveyed by the certified statement of the city auditor to the county treasurer, the ultimate official, whose action was binding and decisive.

From the inevitable conclusion that the plaintiff below proved a mere irregularity, and no more, follows necessarily the further conclusion that the failure of the county treasurer to make a sale in any of the years prior to or subsequent to 1935 is not a default chargeable to the city. City of Winner v. Kelly (CCA8) 65 F (2) 955, Grand Lodge v. City of Winner, 63 SD 390, 259 N. W. 278, supra, Page 9.

The cases upon which counsel relied below and upon which the courts below relied and which will undoubtedly be stressed before this court on appeal are cases from the Eighth Circuit, City of McLaughlin v. Turgeon, 75 F (2) 402, and City of Canton v. Tinan, Receiver, 104 F (2) 961, in which there was no certification for a period of years. Such cases distinguish themselves so readily that further comment is unnecessary. There is a distinction between a failure to act and a defective execution that is plain and is not to be denied.

"It is an immutable rule that a nonexecution shall never be aided," (Sugden, Powers, p. 392) but an attempt to execute will be aided by a court of equity, if defective in form, as in the case of an execution by will of a power which is exercisable only by deed, equity will give aid to such defective execution. (Coats v. Lunt, 210 Mass. 314, 96 N. E. 685).

The act of the city auditor in making direct certification was but defective execution, and was not a case of utter nonaction, such as was presented in the City of McLaughlin and City of Canton cases, **supra.**

II.

THE PROPERTY OWNER HAS NOT ESCAPED FULL LIABILITY FOR PRINCIPAL AND INTEREST BECAUSE OF THE 1935 SALE, HENCE BONDHOLDERS HAVE NOT SUFFERED ANY DAMAGE.

If there was a technical irregularity in the certificate of the city auditor, it would still have been the duty of the county treasurer to make a sale of the property. He could not remain inert and take a proper certificate, even though not in exact compliance with statute. If he refused to sell, his failure or refusal to make a sale in any particular year, would be no default of the city, and the city would not be liable for his acts of omission. City of Winner v. Kelley (CCA8) 65 F (2) 955; Grand Lodge v. Winner, 63 S. D. 390, 259 NW 278. The city could not act to protect the bondholders by making a purchase at any sale. **Idem.** If the contention be that the certification direct to the county treasurer was more than an irregularity, it still remains that the bondholders have lost nothing. The default for purpose of argument may be construed as a serious irregularity which might, in some cases, result in some liability. It cannot be construed, however, as an utter failure to certify. There was, what might be termed, a **de facto** certification. According to the allegations of the complaint, the property covered by the delinquent and unpaid

special assessment certificates was offered for sale by the county treasurer in the year 1935 for the fourth installment which became delinquent in the year of 1934. This appears in the complaint, Paragraph 11. (11). It also appears in the findings. (62). The property was sold to Beadle County, South Dakota, and there was no other bidder therefor;* the county will be entitled to a deed if there is no redemption from the sale in four years from date of sale, Chapter 248, Session Laws of 1937.

No attack is made upon the assessments. The plaintiff recognizes their regularity in all respects, as to amount and procedure. This appears in the findings. Paragraph 4. (53).

It must be taken then as conclusively admitted and established that no successful attack could be made by any person, property owner, or otherwise, upon the assessments, either as to amount or procedure. Equitably, each property owner therefore has had a proper adjustment and assessment of benefits as to his particular piece of property. That being true, the property owner, if he attempted to assail the validity of the proceedings in 1935, under which his property was sold, or if he permitted the county to take deed under those proceedings, and attempted to attack the deed, would be met with the equitable rule obtaining in South Dakota by statute and decision that he must pay the amount of all delinquent assessments into Court before he could be heard or at least before judgment would be entered in his favor setting aside the sale or deed. The rule referred to is embodied in Section 6412, Revised Code of 1919:

> "No injunction restraining the making of any local improvement under the provisions of this chapter shall be issued after the letting of the contract therefor; and whenever any action or proceeding shall

* The county was obliged to bid the whole amount of principal, interest and costs due. Sec. 6787, amended by Chapter 197, Session Laws of 1933; Secs. 6792 and 6794, R. C. 1919.

be commenced and maintained in any court to restrain the collection of any assessment levied for any municipal local improvement, to recover any such assessment previously paid, to recover the possession or title of any real property sold for such an assessment, to invalidate or cancel any deed or grant thereof for such an assessment, or to restrain or delay the payment of any such assessment, the true and just amount of such assessment due upon such property must be ascertained, and judgment rendered property making the same a lien upon the property and authorizing execution or process to issue for the collection thereof by a sale of the property."

This rule is not only statutory in the state of South Dakota but is a rule applicable generally in cases of this kind, by virtue of the equitable powers residing in its courts. Pettigrew v. Moody County, 17 SD 275, 96 NW 94. In that case an action was brought to enforce an equitable right to have certain voidable tax proceedings for the year 1898 cancelled and set aside as to certain real estate. The property was conceded to be subject to taxation. The trial court entered an unconditional decree nullifying all proceedings and restraining the defendant County from asserting a lien under the tax sale proceedings. The Court conceded that the assessment and all subsequent steps taken by the taxing officers were illegal and void. It reversed the trial court upon the ground that the decree was erroneous because the Court had not ascertained the true and just amount of taxes due the purchaser at tax sale. The Court said that the statute providing for such payment by the one seeking to set aside the tax sale was "consonant with equitable doctrine. That an applicant for relief in a case of this character must invariably pay the actual amount of taxes chargeable against his property." In arriving at its decision, the court said:

"In Clark v. Darlington, 11 S. D. 418, 78 N. W. 997, we say: 'It has been the policy of the people of this

state and of the former territory to require the payment of taxes on all real property subject to taxation, and hence they have provided that, whenever any action or proceeding shall be commenced to invalidate or cancel any deed or grant for taxes, it shall be the duty of the court to ascertain the true and correct amount of taxes due upon such property, and render judgment therefor.'

"It being made the duty of the court, both by statute and in equity, to ascertain and adjudge the correct amount of taxes to be paid by the owner, it is not even necessary to tender the amount justly recoverable. Campbell v. Equitable Loan and Trust Co., 14 S. D. 483, 85 N. W. 1015. In a North Dakota case of this character, where the person making the assessment was without even colorable authority to act, and all subsequent proceedings were fatally defective, it was held, in construing section 1643, supra, that relief can be granted only upon condition that plaintiff pay the just amount of taxes for which his property is liable, and that such a judgment in no manner depends upon a request therefor by either party, because the statute was enacted for the protection of the public revenue, and is mandatory in the requirement that 'the true and just amount of taxes due upon such property or by such person must be ascertained, and judgment must be rendered and given therefore against the tax payer'."

Other cases which follow the same doctrine in South Dakota are: Berry v. Howard, 33 SD 447, 146 NW 577; Salmer v. Clay County, 20 SD 307, 105 NW 623, Rosekrans v. Wagner, 29 SD 181, 135 NW 681; Campbell v. Equitable Loan and Trust Co. 14 SD 483, 85 NW 1015.

This sale is adequate and effective to establish the lien of all prior unpaid assessments (Sec. 6794 Rev. Code of

1919*) and of all subsequently accruing assessments **(Idem)**. Section 6794 provides:

> "The county treasurer is authorized at all tax sales made under the laws of this state, in case there are no other bidders offering the amount due, to bid off all or any real property offered at such sale for the amount of taxes, penalty, interest and costs due and unpaid thereon, in the name of the county in which the sale takes place, such county acquiring all the rights, both legal and equitable, that any purchaser could acquire by reason of such purchase; Provided, that whenever any county shall acquire an interest in real property, or any rights with respect thereto, by reason of the same having been bid off in the name of the county as herein provided, such real property shall not be again advertised and sold for delinquent taxes so long as the county retains its interest in and rights to such real property; and provided further, that all taxes subsequently accruing against such real property, or that were unpaid at the time of such sale, and a lien thereon, but not included in such bid, shall be considered as a 'subsequent tax,' and before the county can make an assignment of such interest in and rights to such real property, or before an assignment of the certificate of such sale is made, all such taxes must be paid in full, including the amount for which such real property was so bid off, unless a compromise thereof is made as permitted by law, in which case the amount at which such compromise is made must be paid."

This statute establishes: (1) the 1935 sale excused any further sales; once sold a piece of property need not be sold again, but subsequent annual delinquencies must be added to the sale price and collected; (2) the installments of prior years must likewise be added; (3) the county treasurer must collect all such installments in full.

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* Although this statute in terms applies to general taxes, Sec. 6797, Rev. Code 1919, makes the procedure applicable to special assessments.

The statutory and judicial rule in South Dakota requiring that the owner who would avoid the effect of a voidable sale of his property for delinquent taxes or special assessments, has had universal application to cases of special assessment. See 44 C. J. 757, Sec. 3309.

As is said in the case of State ex rel v. Mayor, (Wis) 77 NW 167:

> "The tendency of legislation and of decision is more and more to require property owners who are contesting taxation, **either general or special**, to pay, as a primary condition of any relief, such part of the tax as is equitable and just, notwithstanding there may be serious irregularities in the original levy." (Emphasis ours).

The city is relieved from liability to the holders of special assessment certificates or bonds issued to provide funds for improvements for which special assessments are levied againt property benefited "at least until such proceedings had been carried to a conclusion, and had failed to produce the necessary funds for the payment of the warrants." Stephens v. Spokane (Wash) 44 P. 541.

The city may only be liable generally to pay "when the right to create the special fund upon which said warrants were drawn did not exist * * * the fact that the city officials had been guilty of negligence in not causing the money to be placed in the special fund at the earliest possible date would not be sufficient to make the city generally liable for payment of such warrants; that only when such negligence had resulted in the city being placed in such condition that it was beyond its power to cause the money to be placed in the special fund for the payment of the warrants, would such general liability be available to warrant holders." **Idem.**

In Hayne v. City of San Francisco (Cal.) 162 P. 625, the owner of property contended that the sale of his property

for a delinquent assessment was void because it was made more than ten days after January 14, 1913, the time fixed therefor in the notice of sale. The court held the complaint would not be entertained without payment of the amount justly due. It said:

> "As we find the assessment to be valid, the property of the plaintiffs is justly liable for its due proportion thereof. In such cases, the plaintiff is not entitled to any relief in a court of equity unless he shall pay, or offer to pay, the amount actually due upon the assessment against his property. As was said in Ellis v. Witmer, 134 Cal. 253, 66 P. 303:
>
> 'This being the case, they cannot successfully invoke the assistance of a court of equity against the irregularities in the sale complained of unless on the condition of paying what is due from them. * * * Here, no such condition has been imposed by the court, nor is there an offer in the complaint to pay what is due. The plaintiffs were therefore not entitled to relief.' "

The city is liable to bondholders on no other theory than that they will sustain a loss because proper steps have not been taken by its officers to collect.

The question of defective performance is abstract, unless the plaintiff shows wherein loss was suffered. A plaintiff has the burden of proof to show the elements of establishing the amount of his recovery. "When a breach of duty has cause no appreciable detriment to the party affected, he may yet recover nominal damages." S. D. Revised Code, 1919, Sec. 2003. Breach of a contract being proved, nominal damages are recoverable, Zipp v. Rubber Co., 12 SD 218, 80 NW 367, but to go beyond that and recover further compensation, the proof must demonstrate an actual loss caused by the wrongful act of defendant.

The applicability of such rule is plain. The rights of the bondholders here remained the same. No supervening liens are found to exist. The owners of the property must

lose their title under the sale proceedings of 1935, and the full security contemplated by statute inure to the benefit of the bondholders, or, if the sale proceedings are vulnerable and a property owner desired, the sale can be set aside but only upon payment of all the past due installments, with interest. Bondholders have suffered no detriment. The plaintiff has failed to show and the findings do not demonstrate wherein the bondholders will not receive as much from the property or from payments by property owners as if the certificates of the city auditor were sufficient to meet the most exacting tests of precision. The rights of the bondholders are not any greater than those of the property owner. Until the bondholder demonstrates that property or property owner have escaped in part if not in whole, the liability imposed by the assessments levied, he has not established a case where the city from its own funds should compensate him. It having been shown that property and property owner remain liable for the instalments despite irregularities in the certificates, exactly as if they were technically correct, the bondholders have failed to establish a cause for more than nominal damages.

Brief reference may be made to the theory on which the plaintiff relied below, and on which he will undoubtedly rest in this court. It is that all proceedings taken to divest an owner of title for failure to pay taxes are construed strictly against the taxing authority, and even as mandatory. The case of Huckstedt v. Jamison, 59 S. D. 464, 240 N. W. 506, was relied on. That case applied the rule of caveat emptor against the purchaser at tax sale, and involved the rights of a defendant who had acquired title to real property by tax deed. His title was set aside, but "upon condition that plaintiff first do equity by payment to defendant of all sums expended in payment of taxes, together with interest thereone at the statutory rates as in case of a redemption." The case fully sustains our position, that even if the sale were voidable, property owners could avoid its effect only upon payment of all sums due as in case of a redemption, and bondholders will sustain no loss. Whittaker v. Deadwood,

12 SD 608, 82 N. W. 202, was also relied on below. That case is distinguishable, because there the very proceedings involved in ordaining the improvement and the assessments were attacked, while here the special assessments are admitted and found to be regular. It is true that the sale was also held invalid, for failure to hold it at the time specified in the charter. The question of the property owner tendering or making payment of the amount justly due in order to avoid the sale was not discussed. If the proceedings leading up to the assessment were void, the property of course was not subject to assessment, and the property owner need not make such tender. Many other South Dakota cases establish that while tax deeds may be set aside for irregularities, the liability to pay what is justly due remains and payment of tax with interest is a condition precedent to relief vacating the sale or tax deed. Webster v. Cressler, 65 SD 571, 276 NW 263; McKinnon v. Fuller, 33 SD 582, 146 NW 910; Berry v. Howard, 33 SD 447, 146 NW 577; Easton v. Cranmer, 19 SD 224, 102 NW 944; Pettigrew v. Moody County, **supra**, page 27, 17 SD 275, 96 NW 94; Thompson v. Roberts, 16 SD 403, 92 NW 1079.

It is respectfully submitted that in its opinion the Circuit Court of Appeals for the Eighth Circuit misapprehended, if it did not improperly minimize, the effect of the statutes of South Dakota. The Court said that a serious doubt as to validity would seriously affect the possibility of collecting anything "from a sale clothed with a strong suspicion of illegality." But the lien of the special assessment is an everlasting lien as against the property assessed. Sec. 6403 S. D. Rev. Code 1919. The sale is merely a step in the foreclosure of a lien. As has been pointed out, if valid, then the property owners affected will lose their property when the time for redemption passes and the bondholders will realize the security behind the bonds. If they redeem, nothing has been lost to the bondholders. If they attempt to invalidate the sale, or the deed issuing when the period of redemption expires, they will be obliged to meet the equit-

able obligation of paying the full amount of assessments against their property.

In its opinion the Circuit Court of Appeals of the Eighth Circuit also said that "It may be, as the City contends, that because of the statutory direction that mere informalities will not affect the validity of tax title in South Dakota, the courts of that state would reach the conclusion that the error in the certification now under consideration was not a fatal defect, but that question is a highly debatable one which could only be definitely determined by judicial proceedings." Respectfully, it must be suggested that a judicial proceeding was pending for the very purpose of determining what, if any, prejudice or detriment could have resulted to the bondholders.

The court also reasons that the sale in 1935, clouded by obvious legal irregularities would not "attract cash purchasers at fair values. Absent such purchasers at those values plaintiff's opportunity to realize the amount of the delinquent assessments in cash was greatly minimized. The County's compulsory bid was of no benefit to plaintiff since it only resulted in the transfer of title without the payment of any cash consideration. And the fact that the County's compulsory bid was the only one received implies a scarcity of interested buyers and tends to further strengthen plaintiff's contention that the patent irregularity in the certification materially and injuriously affected the sale. The protection to the purchaser at the tax sale afforded by the requirement that the amount of delinquent assessments must be paid before his title be disturbed is no substitute for the right of the plaintiff to a sale as free from legal defects as the City could reasonably make it." But the bid of the County was of value, since it commenced the period within which redemption must be made or property lost under deed to the County. Ch. 64 & 65, S. D. Session Laws of 1933. In South Dakota at least, the purchase of real property by the county at tax sales is not such a phenomenon as the court apparently considered. There are statutes permitting the

county treasurer to bid off property offered at tax sale (Sec. 6794 S. D. Rev. Code of 1919) and providing the method of disposition of property acquired by the county by tax deed (Sec. 6803 R. C. 1919, Ch. 64, S. D. Session Laws of 1933, Ch. 83, S. D. Session Laws of 1937). Judicial notice may be taken of local financial and economic conditions. Culhane v. Equitable Life Assurance Society, 65 SD 337, 274 NW 315, Home Bldg. and Loan Assn. v. Blaisdell, 290 U. S. 398, at p. 444. Moratorium acts of the state legislature, in elaborate preambles, have found the existence of a state of agricultural and financial depression, resulting among other things, in a situation whereby owners of property are "unable to meet obligations for * * *taxes * * *." Ch. 145, S. D. Session Laws of 1939; Ch. 207, S. D. Session Laws of 1937; Ch. 178, S. D. Session Laws of 1935. In the face of such facts, it is clear that a lack of cash bidders at the sale resulted, not from a defect in the procedure, but from the economic conditions in the state. Indeed, a local court would have known judicially that even in prosperous times nearly all property sold for delinquent taxes is purchased by the county. Further evidence of local conditions is found in other legislation pertaining to taxes; so accentuated has been the condition that the Legislature of South Dakota in 1939 passed legislation permitting the county commissioners to compromise personal taxes more than two years past due, Chapter 284, Session Laws of 1939; permitting payment of delinquent real estate taxes in ten annual instalments on contract with the county without interest on the contract amount, Chapter 279, Session Laws of 1939, and also permitting payment of principal of taxes delinquent upon real estate at any time prior to December 31, 1939, with an abatement of all interest accrued and penalty charged, Chapter 280, Session Laws of 1939. The first statute providing for the contracting of payment of delinquent taxes by which the person liable for them was given ten years in which to pay without interest is found in Chapter 194 of the Session Laws of 1935. Similar legislation was found in Chapter 241, Session Laws of 1937.

Such legislation, an innovation, and having the purpose

to make it attractive for tax payers to pay delinquent taxes indicates the prevalence of the condition to which reference has been made. It is respectfully submitted that it makes it apparent that the court has inadvertently attributed the fact that there were no purchasers for the property offered for sale in 1935 other than the county to the illegality in certification while properly it should be referred to the financial conditions in the state.

In Webster v. Cressler, **supra**, the contention was that an assessment of taxes was void because the assessor failed to take the oath prescribed by law and failed in other respects strictly to comply with the statutes, and the court should have reassessed the property. A judgment requiring appellant landowner to pay the amount of taxes and interest and penalty assessed, to the holder of a void tax deed was affirmed. The court said:

> "Appellant has failed to show that the assessment was unjust or inequitable in relation to other assessments, and therefore is not entitled to have the property assessed by the court because of the failure in some other respects to make this assessment strictly comply with the statutes.
>
> The trial court is directed to modify its judgment by deducting, from the amount of the lien allowed the plaintiff, the costs of procuring the tax deed, and as thus modified, the judgment is affirmed."

So it makes no difference in result in this action for damages which conclusion is adopted. If the irregularities complained of have not prejudiced the property owners, and they cannot avoid the lien (a perpetual lien, Sec. 6403 S. D. Revised Code, 1919), or defeat a sale of their property for nonpayment of the assessment, the bondholders have suffered no loss. At least, full realization of the security, the property against which assessments were levied, will be theirs. On the other hand, even if the property owner can avoid the sale, and thus save his property from deed issuing,

it can be only on the equitable condition, given full scope in the South Dakota statutes and decisions, that he pay the assessment in full. The result is that no more than nominal damages were proved.

III

ON NO THEORY HAVE MORE THAN NOMINAL DAMAGES BEEN ESTABLISHED ACCORDING TO THE STATE RULE AND THE RULE OF THE TENTH CIRCUIT.

In considering and deciding a similar case, the Circuit Court of Appeals of the Tenth Circuit held exactly in line with the contention of the petitioner here, that proof of a default on the part of the city would not establish a liability on the city to pay bondholders, if there were no proof of the actual damages sustained. The Court stated the true rule as follows:

> "Where the owner of an obligation enters into a contract with another to act as agent of the owner in the collection of such obligation and to take certain steps to enforce the obligation and the agent fails and neglects so to do, would the agent be liable to the owner of the obligation for the principal thereof with interest when the owner may still enforce payment of the obligation by the debtor? We think not. It seems to us the same rule should apply here."

This is found in the case of Gray v. City of Santa Fe (CCA10) 89 F (2) 406. This Honorable Court has indicated approval of the same rule. In Peake v. City of New Orleans, 139 U. S. 342, it is said:

> "Where an official board (of a city) assumes the obligation of collecting assessments, the mere fact of noncollection does not prove dereliction of duty where they are charged upon property not worth the assessment, therefore were not collectible."

Approval also appears in Moore v. City of Nampa 276

U. S. 536, where it is said:

> "The demurrer was rightly sustained unless the complainant shows that the breach of respondent of some duty it owed petitioner caused the damages sustained."

The Supreme Court of South Dakota has clearly indicated that special assessments against property benefited by the local improvement are not charges against the general funds of the city, and are not payable out of money raised by taxation. Suttor v. Town of Wetonka, 62 S. D. 339, 253 N. W. 64; Gross v. City of Bowdle, 44 S. D. 132, 182 N. W. 629. The question, is, therefore, what damages have been shown to have been sustained by loss or depreciation of the security, that is, the property against which the assessments were levied. None is pleaded or proved.

It is the holding of this Honorable Court in Moore v. City of Nampa, 276 U. S. 536, that the cause of action in the bondholder in a case such as this is not on contract, but is in tort, based on negligence. In the preceding portions of this brief, following the reasoning of the District and Circuit Court of Appeals, it has been assumed that the action was contractual, based upon the promise of the city contained in the bonds to levy assessments and cause the same to be collected and paid into a fund to be used solely for the payment thereof (3). But, whether the action sounds in tort or contract, the result must be the same: in the absence of proof of damages, none but nominal damages are recoverable. This is the only result that can be obtained by application of local statutes and decisions which are controlling. Erie R. Co. v. Tompkins, 304 U. S. 64.

First, the South Dakota statutes may be examined. "Every person who suffers detriment from the unlawful act or omission of another may recover from the person in fault a compensation therefor in money, which is called damages." Sec. 1959, S. D. Revised Code, 1919. "Detri-

ment is a loss or harm suffered in person or property." Sec. 1960, S. D. Revised Code, 1919.

As to contracts, the rule found in Sec. 1966 S. D. Rev. Code of 1919 is as follows:

> "For the breach of an obligation arising from contract, the measure of damages, except where otherwise provided by this code, is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom. **No damages can be recovered for a breach of contract which are not clearly ascertainable in both their nature and origin.**" (Emphasis ours.)*

As to torts, the rule is stated in section 1984, S. D. Rev. Code, 1919, as follows:

> "For the breach of an obligation not arising from contract, the measure of damages, except where otherwise expressly provided by this code, is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not."

Sec. 2002, S. D. Rev. Code 1919 provides that "Damages must in all cases be reasonable," and Sec. 2003 S. D. Rev. Code of 1919 provides as follows:

> "When a breach of duty has caused no appreciable detriment to the party affected, he may yet recover nominal damages."

From these clear statements, embodied in statute, the conclusion must be that absent proof of the detriment caused by the act of the city auditor, no damages, other than nominal could be recovered.

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*The distinction between the state rule as declared in this statute (Sec. 1966, S. D. Rev. Code 1919), that damages must be certain, both in their nature and origin, and the Federal rule, that if the cause of the damages were clearly ascertainable, the extent of damages could be proved by approximation (Midland Valley R. Co. v. Excelsior Coal Co. (CCA8) 86 F (2) 177, Story Parchment Company v. Paterson Paper Co., 282 U. S. 555) is striking.

The course of judicial decision in South Dakota is to the same effect.

In actions ex delicto, the Supreme Court of South Dakota has said that damages will not be permitted where there are no facts proved which would establish them (Gamble v. Keyes, 43 S. D. 245, 178 N. W. 870). In an action by an agent having an exclusive right to sell machinery in a county against his principal for having breached a contract permitting another to makes sales in the county, the agent can recover no more than nominal damages upon merely showing the breach by the principal. Roberts v. Minneapolis Threshing Machine Co. 8 S. D. 579, 67 N. W. 607. In this case, the Supreme Court of South Dakota said that "without anything before the jury as a basis for the computation of compensatory damages, and in the entire absence of evidence tending to show that in any event appellant (plaintiff) would have made either of the sales complained of, or that he performed any act with reference thereto, mere proof of the violation of the contract would entitle appellant to no more than nominal damages, * * *" and "that the actual detriment occasioned must be shown by competent evidence, and with reasonable certainty, in order to entitle appellant to anything more than nominal damages."

Thus, in tort and contract actions, the Supreme Court of South Dakota has said that damages must be proved by substantial evidence. This seems to be elementary not only in that state, but in all jurisdictions, but if so, all the more glaring is the error into which the Circuit Court of Appeals has fallen.

Applying the same principle, in Wylly v. Grigsby, 10 S. D. 13, 70 N. W. 1049, 11 S. D. 491, 78 N. W. 957, the Supreme Court of South Dakota held that the unauthorized and fraudulent act of an agent in delivering a release of a mortgage to the owner of land, which was recorded, gave rise to an action for conversion by the owner of the mortgage for nominal damages only, when it appeared that the

title to the land remained in the hands of one not a bona fide holder for value, and the right to foreclose the mortgage had not been appreciably affected.

Similar must be the result here. What rights of the bondholders having as security the assessments against the property have been shown to have been diminished or impaired in the least?

If it be conceded that the defective certification by the city auditor may have caused a delay in collection, then the rule that interest is the damage resulting from failure to pay money when due, should apply.

In Louden v. Taxing District 14 Otto 771, it is said:

> "All damages for delay in the payment of money owing upon contract are provided for in the allowance of interest, which is in the nature of damages for withholding money that is due. The law assumes that interest is the measure of all such damages."

The difficulty is that plaintiff has not proved that any delay has been caused, or that the bondholders are not in exactly the same position they would have found themselves in if certification had precisely and technically followed the statute.

As to principal of the bonds, the same logical difficulty follows. The security back of them does not appear to be any less valuable, or any less amenable to eventual liquidation, either by title to the property vesting in the county, or by redemption by the property owners, than if certification had followed the exact method prescribed by statute.

The trial court has found the city liable for the full amount of principal and interest of the seventeen bonds which plaintiff holds as trustee, and yet the proof shows that some property owners have never permitted instalments to become delinquent. (Exhibit J (48).) Further, proper certifications were made in 1937 and 1938, and a sale held in 1935 by the county treasurer, and the certifications

from 1932 to 1936 inclusive were but irregular. Clearly, the city as a guarantor, in form, against loss to the bondholders by default of its officers, is not liable for the whole of the principal and interest of these seventeen bonds, but only for such loss as in origin and amount is clearly ascertainable from the acts of the city auditor. (Section 1966, Rev. Code 1919).

A breach of duty by the city auditor might be so gross as to make the city liable for the whole of the principal of the bonds plus interest. No such breach appears here. The question must recur, to what extent has damage been suffered by the bondholders. If, for example, a city auditor failed to certify as delinquent a piece of property on which an instalment of $100.00 was delinquent, would the city, in a total bond issue of $100,000 be liable for $100,000 or $100.00? Clearly the latter. If certification were imperfect for one year, but property owners paid in full, would the city still be liable? If the property owners did not pay, but deeds issued upon appropriate procedure, and the statutory security for the bondholders eventually paid them their full principal and interest, have they suffered any damages.

The inquiry for the court in this case was what, if any damages, were to be paid to compensate the bondholders.

Such inquiry has not been made.

The Circuit Court of Appeals of the Eighth Circuit refused to consider the question of damages because it felt itself bound by its own precedents, the case of City of Canton v. Tinan 104 F(2) 961, which automatically followed as a precedent the case of City of McLaughlin v. Turgeon, 75 F(2) 402, the opinion in which case was filed January 28, 1935, subsequently to which, on April 25, 1938, Your Honors decided Erie R. Co. v. Tompkins, 304 U. S. 64, making more commanding than had been true before, the law of the state of the controversy. It is suggested, with the respect properly to be given the judges of that learned court, and to its eminence and reputation, that in deciding

the case of City of McLaughlin v. Turgeon, **supra**, the Circuit Court of Appeals for the Eighth Circuit, did not give such effect to the law of the state as would have been given had that case been decided after, rather than before the decision in Erie R. Co. v. Tompkins.* The subsequent case of City of Canton v. Tinan, supra, and the instant case, it seems clear, were decided on the basis that City of McLaughlin v. Turgeon was a controlling precedent, without considering the effect that Erie R. Co. v. Tompkins had upon all prior Federal decisions, which had been written under the influence of Swift v. Tyson, 16 Pet. 1, the rule of which was repudiated by Erie R. Co. v. Tompkins.

On the question of damages, in City of McLaughlin v. Turgeon, **supra**, the Circuit Court of Appeals for the Eighth Circuit said that the plaintiff

"in the circumstances here disclosed, was entitled to sue for damages for breach of contract, the measure of his damages being the contract price, or, in this case, the amount due on the bonds, as held by the lower court. Freese v. City of Pierre, 37 SD 433, 158 N. W. 1013; Coolsaet v. City of Veblen, 55 SD 485, 226 N. W. 726, 67 A L R 1499; Barber Asphalt Paving Co. v. City of Denver (CCA8) 72 F 336; Bates County, Mo. v. Wills (CCA8) 239 F. 785; Barber Asphalt Paving Co. v. City of Des Moines 191 Iowa 762, 183 N. W. 456; Grand Lodge v. City of Bottineau, 58 N. D. 740, 227 NW 363." (at p. 410).

It is apparent from the quotation itself that the Court was not attempting to rest its decision on South Dakota decisions alone, and was not considering the state statutes. A brief study of the decisions cited as authority convinces that they are not authority for the broad rule laid down. The case of Barber Asphalt Paving Company v. City of Denver 72 F. 336, was a case from Colorado, decided by the

*This is all the more apparent because prior to the decision in Erie R. Co. v. Tompkins, the Federal courts adopted the rule that in tort or contract, they would follow their own rule, rather than the state decisions. Wolden v. Larson (CCA9) 164 F 548 (torts); Clark v. Belt (CCA8) 223 F. 573 (contracts).

Circuit Court of Appeals of the Eighth Circuit. It is important to note that this was a case by the contractor against the city to recover the contract price of paving. An action by a contractor against a city on its contract, he being unsecured and having the promise of the city to pay, is radically different from an action by bondholders on bonds issued by the city, which do not contain its promise to pay, but to use good faith to follow the statutory procedure to collect, and which are secured by levies against property. Liability in that case is based on the proposition of law that one who induces a contractor to perform labor or furnish materials by his promise that a third person will pay the contractor the agreed price of what he furnishes, cannot enjoy the fruits of the contract, and leave the contractor remediless. He becomes primarily liable to pay the contact price himself. (See p. 338 of 72 Federal). The facts in that case were that the city promised in the contract that a part of the contract price would be paid by a street railway company, at the time and in the manner directed. The city did not cause the street railway company to pay and refused to pay itself. The importance of the contract entered into by the city, undertaking a primary obligation to pay is manifest throughout the opinion, and is evident from such statements as "This contract was between the city and the paving company" (page 340) and "By this contract the city became primarily liable to pay that part of the contract price of these improvements which it agreed that the railroad companies should pay, when it failed, for an unreasonable length of time after the completion of the contract to cause the companies to make the payment" (page 340).

The case of Bates County v. Wills (CCA8) 239 F 785, is exactly similar. This was an action by the contractor against the county on the original contract. The county refused to pay or to proceed to make funds available. This case arose in Missouri.

*Cf. Lincoln v. Ricketts (1936) 296 U. S. 374, in which a decision of the Circuit Court of Appeals of the Eighth Circuit was reversed and the case returned for a determination of the issue of local law.

Barber Asphalt Paving Co. v. City of Des Moines, 191 Ia. 762, 183 NW 456, is another case of an action by the contractor, who claimed damages against the city because it had failed to make a certain piece of property subject to special assessment, and to provide for interest on the assessment certificate. In that case, clearly, the damages were the amount of which the contractor had been deprived, the amount of the special assessment certificate which the city had failed to make a lien against a particular piece of property, and also the interest on the total amount of special certificates issued and which the city had failed to make provision for in its procedure.

Another case cited is the North Dakota case of Grand Lodge v. City of Bottineau, 58 N. D. 740, 227 N. W. 363. In that case, the statute required the city to bid in the property benefited if there were no bidders. It failed to do so and the county in the end took tax deed to the property. The security for the special assessment warrants was lost to warrant holders.

Turning now to the South Dakota authorities cited by the court, the first is Freese v. City of Pierre, 37 SD 433, 158 NW 1013. This was an action by the assignee of the contractor against the city, which the Supreme Court found had disabled itself from levying an assessment against property included in the special assessment district. The court found that the whole proceedings were void, and directed judgment to be entered against the city for the balance due on the contract. The Court held that since the city had proceeded from the outset in an improper and unlawful manner,* and had disabled itself not only from assessing against the property benefited the amount of the contract price, but had also disabled itself from reassessing for the same purpose, it was liable to the contractor's assignee for the balance due on the contract. It is not

*The court said (p. 438 of 37 S. D. p. 1014 of 158 N. W.) that the proceedings up to the filing of the assessment roll "from the beginning up to this point exhibited a most flagrant disregard of law on the part of the city council."

seen how under the facts a different result could be reached. The city had made it utterly impossible for the contractor to be paid through the contemplated agency of special assessments. The court held (p. 442 of 37 S. D., p. 1016 of 158 N. W.) that the city was liable for the full amount due the contractor on another theory. The assignee of the contract was also assignee from the city of treasurer's sale certificates aggregating a sum in excess of the amount due on the contract. The court quoted Section 1319 of the Political Code of 1903, as follows:

> "Whenever a special assessment for a local improvement shall be set aside or declared null and void by a court of competent jurisdiction, the city shall save the purchaser at the sale for said special assessment harmless, by paying him the amount of the principal which he paid upon such sale, together with interest at 12 per centum from the date of sale."

The court held that as assignee of these certificates, the plaintiff was in the same position with reference to them as a purchaser at the treasurer's sale would have occupied, and was entitled to recover the amount of the certificates with 12 per cent interest from the city.

The statute was influential in the court's decision in that case. It was part of the 1903 code. It was left out of the 1919 Code, the next revision of South Dakota statutory law. It required as a condition of liability on the part of the city that the special assessment should have been set aside or declared null and void. It indicated a statutory policy of liability since repealed, which reveals, if anything, a legislative policy to exempt cities from liability, to remit the purchaser to his remedy against the property provided by Section 6412 Rev. Code 1919. The case of Freese v. City of Pierre is not authority to sustain a broad, inclusive rule that the city is liable to bondholders for all defects or irregularities that might occur in taking the statutory steps to collect delinquent assessments, when the improvement was regularly begun and completed and the assessment

against the benefited property was properly levied.

The final authority cited is Coolsaet v. City of Veblen, 55 SD 485, 226 N. W. 726. The case is complicated at least by the fact that the city had entered into a stipulation for judgment for the amount due on its contract. The judgment was entered on the stipulation and the city then attempted to appeal. **Again, this was an action by the contractor,** whose right to realization of payment by special assessment was utterly defeated, through procedural defects. The contract obligated the city to pay in cash or valid special assessment certificates.

The South Dakota cases are not authority for the proposition that the respondent here must sustain: that in an action by bondholders, whose bonds are payable only from the proceeds of special assessments, the bondholders are entitled to recover from the city the full amount of their bonds, upon mere proof that an officer of the city, committed a procedural error, which it is not shown has caused the bondholders a detriment to any extent. It must be submitted that to sustain this proposition requires a disregard of the South Dakota statutes and Supreme Court decisions. Authorities sustaining the right of the contractor to enforce the primary obligation of the city on the contract of improvement, preceding the entry of the bondholders upon the scene, who do not take the obligation of the city to pay but only to act as collecting agent are clearly not apposite.

CONCLUSION

Petitioner submits that the decision of the Circuit Court of Appeals is contrary to decisions of this Honorable Court, and to the decisions of the Supreme Court of South Dakota and to the statutes of that state, and is contrary to the decision in a like case of the Circuit Court of Appeals of the Tenth Circuit, and that for the reasons set forth in the petition the case calls for the exercise of this Court's power of review.

Respectfully submitted,

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